

Countryman, Ryan

From: Tom McCormick <tommccormick@mac.com>
Sent: Thursday, December 26, 2019 1:05 PM
To: County Executive
Cc: Parks, Eric; Klein, Ken; Mock, Barb; McCrary, Mike; Dobesh, Michael; Otten, Matthew; Countryman, Ryan; MacCready, Paul; Tom Mailhot
Subject: BSRE reneges on its promised "fresh start," with noncompliant 180-foot towers in its Dec. 12 resubmission
Attachments: 2019-08-07 BSRE letter to SCE Somers.pdf

CAUTION : This email originated from outside of this organization. Please exercise caution with links and attachments.

To The Honorable Dave Somers:

I read the August 7, 2019, letter that Miki Zisman, BSRE's new CEO, sent to you (copy attached). He says:

"We are happy to be making a fresh start. ... We are here to restart, and we bring a fresh spirit of cooperation, openness and sincerity: we wish to develop a win-win project in Point Wells."

Two weeks ago, with the resubmission of its applications, BSRE had an opportunity to make a "fresh start," but it chose not to.

In its December 12 resubmission, BSRE chose to disrespect you and the County by retaining noncompliant 180-foot towers and numerous other buildings taller than 90 feet. Shame on BSRE for doing this, after the Hearing Examiner last year denied BSRE's applications (affirmed by the County Council), concluding that buildings taller than 90 feet were in substantial conflict with SCC 30.34A.040(1).

For details about BSRE's disrespectful 180-foot gamble, and its attempt to use the minimum FAR rules as an excuse for needing buildings taller than 90 feet, please read the email that I sent to Director Mock on December 17 (copy embedded below). And see what I say about BSRE's not-so-subtle takings claim (a meritless claim):

"If the County will not allow building heights over 90 feet, the County will have necessarily rendered the property undevelopable by designating it as an Urban Center under the zoning code and in the County comprehensive plan."

Is this what Mr. Zisman means by "a fresh spirit of cooperation, openness and sincerity?"

The problem is not just the 180-foot towers, but the overall damaging scale of BSRE's proposed development. If BSRE is committed to making a "fresh start," BSRE would cease trying to jam a size 10 development into a size 2 infrastructure, with severely damaging environmental impacts incapable of being mitigated.

I trust that the County will again deny BSRE's applications, but this time with prejudice.

Meeting request: I understand that BSRE consultant Steve Ohlenkamp and representative Lou Frillman met with you, Eric Parks and Ken Klein in August. Weeks later, Mr. Zisman himself, and presumably others associated with BSRE, met with Mr. Parks, Mr. Klein, Mike McCrary, Michel Dobesh, and Matt Otten. I would

be most grateful if you would extend a similar opportunity to me and a colleague, to meet with you, Eric Parks, and Ken Klein to discuss our environmental concerns with BSRE's current proposal, and our vision of what would be a genuine fresh start for Point Wells.

Thank you.

Tom McCormick

*"A small development at Point Wells
with a second public access road,
or no development at all."*

Begin forwarded message:

From: Tom McCormick <tommccormick@mac.com>
Subject: Denying BSRE's resubmitted applications due to ongoing substantial conflict with SCC 30.34A.040(1)
Date: December 17, 2019 at 11:40:22 AM HST
To: "Barb Mock, Director" <barbara.mock@snoco.org>
Cc: Mike McCrary <mike.mccrary@snoco.org>, Ryan Countryman <ryan.countryman@snoco.org>, Michael Dobesh <michael.dobesh@snoco.org>, Paul MacCready <paul.maccready@snoco.org>, "Otten, Matthew" <matthew.otten@co.snohomish.wa.us>

Director Mock,

I respectfully request that you recommend immediate denial of the applications that BSRE resubmitted on Dec. 12, 2019.

There is at least one ongoing substantial conflict that alone provides ample grounds to recommend denial.

BSRE's applications still include numerous buildings taller than 90 feet.

I.

In a 2018 decision affirmed by the County Council, the Hearing Examiner decided that buildings taller than 90 feet at Point Wells were in substantial conflict with SCC 30.34A.040(1), both because of the lack of high capacity transit access at Point Wells, and because the record lacked any evidence to support a conclusion that the additional height is necessary or desirable. (BSRE appealed the Hearing Examiner's decision. It filed its initial brief with the Court of Appeals on Dec. 12, 2019.)

The Hearing Examiner has spoken.

Because BSRE's revised applications still include numerous buildings taller than 90 feet, the County should again deny BSRE's applications to develop Point Wells as an Urban Center.

BSRE has disrespected the County and the Hearing Examiner by knowingly resubmitting it applications containing a substantial conflict with SCC 30.34A.040(1).

The building height substantial conflict, by itself, compels denial. There is no reason to expend time and resources reviewing the rest of BSRE's resubmitted application materials.

Please make a recommendation to the Hearing Examiner to deny BSRE's applications again, but this time with prejudice. Immediate denial of BSRE's resubmitted applications will spare PDS and the general public from wasting further time and resources on this matter.

II.

As a desperate long shot, BSRE has added a new twist. It wants a variance from the 90-foot height limit. It has submitted a request for a "variance to allow for the maximum height of 180 feet."

BSRE's long-shot variance request is dead on arrival.

Per SCC 30.43B.020(2), BSRE's variance gets presented to the Hearing Examiner. The Hearing Examiner, however, lacks the authority to approve a SCC 30.43B.020 variance to allow buildings taller than 90 feet.

In SCC 30.34A.040(1), the County Council legislatively prescribed the only path for the Hearing Examiner to approve a building height taller than 90 feet:

"A building height increase up to an additional 90 feet may be approved under SCC 30.34A.180 when the additional height is documented to be necessary or desirable when the project is located near a high capacity transit route or station and the applicant prepares an environmental impact statement"

The Hearing Examiner lacks authority to disregard the very specific terms of SCC 30.34A.040(1), and approve buildings taller than 90 feet for some other reason. The very specific terms of SCC 30.34A.040(1) control, leaving no room to approve a variance under the general provisions of SCC 30.43B.020.

As we know, the Hearing Examiner has spoken. The Hearing Examiner concluded that buildings taller than 90 feet at Point Wells were in substantial conflict with SCC 30.34A.040(1), both because of the lack of high capacity transit access at Point Wells, and because the record lacked any evidence to support a conclusion that the additional height is necessary or desirable.

Please make a recommendation to the Hearing Examiner to deny BSRE's variance request. The Hearing Examiner lacks authority to disregard the very specific terms of SCC 30.34A.040(1). Immediate denial of BSRE's resubmitted applications and its variance request will spare PDS and the general public from wasting further time and resources on this matter.

III.

BSRE took a gamble by resubmitting its applications with buildings taller than 90 feet.

For the reasons discussed above, BSRE's applications should be denied now, with prejudice.

Later, BSRE can resubmit applications to develop the site as an Urban Village.

In its variance request, BSRE contends that,

"If the County will not allow building heights over 90 feet, the County will have necessarily rendered the property undevelopable by designating it as an Urban Center under the zoning code and in the County comprehensive plan. ... The variance is necessary to preserve the substantial property right of being able to develop the property pursuant to its vested property zoning."

BSRE is wrong. The site could easily have been developed as an Urban Center with buildings no taller than 90 feet, as explained below.

IV.

Though the Hearing Examiner lacks authority to approve BSRE's variance request, BSRE makes contentions in its request that deserve a response.

BSRE's Contention #1: To satisfy the minimum FAR, buildings must be taller than 90 feet.

Under Point 2 of its variance request, BSRE says that, "In order to satisfy the minimum FAR, the buildings must be constructed greater than 90 feet tall"

The Truth: The minimum FAR can easily be satisfied with buildings no taller than 90 feet.

Consider this excerpt from Ryan Countryman's testimony during the May 21, 2018 hearing (transcript pages 104-105):

"Q: In his opening, Mr. Huff described how the application barely satisfies the county's minimum FAR. If they're unable to build the proposal as currently designed, for example, due to no buildings over 90 feet being allowed ..., it would automatically result in the project not being able to meet the minimum FAR. Do you think this statement is accurate?

A. No. I don't think that that statement is accurate because we have lots of projects that come in well above the 1.0 FAR. But they do it through other mechanisms of site design. They've got -- wider buildings is a common solution. ...

Q. Okay. So could -- would wider buildings provide more floor area and square footage?

A. Yes."

Exhibit 2 of BSRE's variance request shows a FAR of 0.907 with buildings no taller than 90 feet. The footprints of the buildings are exactly the same as in BSRE's 180-foot drawings (Exhibit 3 of the variance request). With a few more buildings, or with slightly wider buildings, BSRE could easily satisfy the minimum FAR. A 10% average increase in floor area would suffice ($0.907 + 0.907 \times 10.25\% = 1.0$).

BSRE's desire not to modify the building footprints or add a few more buildings, as well as its insistence on having buildings that are taller than 90 feet, is of its choosing, and now it must

suffer the consequences of its gamble — denial of its its resubmitted applications due to an ongoing substantial conflict with SCC 30.34A.040(1).

BSRE's Contention #2: A variance is necessary to allow development on the Point Wells.

Also under Point 2 of its variance request, BSRE says that:

“This variance is necessary to allow development on the Point Wells site. ... Additional height is necessary to allow the property to be developed as an Urban Center at all. If the County will not allow building heights over 90 feet, the County will have necessarily rendered the property undevelopable by designating it as an Urban Center under the zoning code and in the County comprehensive plan. ... The variance is necessary to preserve the substantial property right of being able to develop the property pursuant to its vested property zoning.”

The Truth: As noted above, a minimum FAR of 1.0 can easily be satisfied with buildings no taller than 90 feet. BSRE’s requested variance to allow buildings taller than 90 feet is NOT necessary to allow development on the Point Wells site.

But there’s a much bigger issue that needs to be addressed, involving BSRE's repeated efforts to use the minimum FAR requirement as an excuse for failing to comply with other rules.

Regarding building heights, BSRE tries to paint the picture that it is being pushed into a corner with no good options — complying with the County’s minimum FAR requirement will cause it to violate the County’s 90-foot building height limit, and complying with the County’s 90-foot building height limit will cause it to violate the County’s minimum FAR requirement. (As noted above, this picture is inaccurate. By adding buildings or making existing ones wider, BSRE can comply easily with both the minimum FAR requirement and the County’s 90-foot building height limit.)

BSRE efforts to use the minimum FAR requirement as an excuse for failing to comply with other rules is not limited to building heights.

Earlier this year, BSRE tried to paint a similar picture of being pushed into a corner with no good options regarding traffic. In a GMHB proceeding, BSRE argued that the minimum FAR requirement will necessarily cause it to exceed the City of Shoreline’s 4,000 ADT limit on Richmond Beach drive. And the flip side is that if it complies with the City of Shoreline’s 4,000 ADT limit, it will necessarily violate the County’s minimum FAR requirement. (For more information, see my Dec. 3, 2019 email to you).

The underlying weakness of BSRE’s efforts is that, as a precondition to making such claims, BSRE must first try to get out of having to comply with the minimum FAR requirement. It must exhaust all available administrative remedies.

BSRE’s contention that the County has "rendered the property undevelopable" is without merit because BSRE has failed to seek available relief from the minimum FAR requirement that is allegedly causing its problems. For example, BSRE could have asked the County to waive the minimum FAR requirement, or it could have sought a variance to use the Code’s current rules. Having failed to do so, any claim that the County has "rendered the property undevelopable" is not ripe and is without merit. Consider this excerpt from my Dec. 3, 2019 email to you:

With a variance using the County's current rules, BSRE can satisfy the minimum FAR requirement with only 700,000 square feet of building floor area at Point Wells (= net site area of approximately 1.4 million square feet X 0.50 minimum FAR). Contrast that with the 2.6 million square feet of buildings that BSRE has assumed is required under the 2010 rules.

If BSRE continues to assert that the minimum FAR rules require that it build a huge, tall development with at least 2.6 million square feet of residential and commercial space, do not believe it. A variance is there for the asking. I can think of no reason why the County would deny a request to use the County's current minimum FAR rules.

If the 4,000 ADT limit or any other requirement relating to BSRE's soon-to-be-filed revised application can be addressed by applying for a variance from the minimum FAR rules, then BSRE must apply for the variance or risk denial of its application.

In another context it's been said that, "A landowner may need to seek a variance or submit multiple applications to determine the full extent to which the regulatory laws may allow or limit development." *Advisory Memorandum and Recommended Process for Evaluating Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Takings of Private Property*, Washington State Attorney General, page 13 (December 2015).

BSRE's Contention #3: Denying the variance request will adversely affect the comprehensive plan.

Under Point 4 of its variance request, BSRE says that, "Denial of the variance would adversely affect the comprehensive plan because it would prevent development of the Point Wells site."

The Truth: As discussed above, denying the variance request would not prevent development of the site. Therefore, it would NOT adversely affect the comprehensive plan.

Moreover, the County's 2011 Comprehensive Plan does not require anywhere near the density that BSRE seeks. Per LU Policy 3.A.4., "Residential net densities shall not be less than 12 dwelling units per acre." The Comprehensive Plan (at Page E-10) defines "net density" as "the density of development excluding roads, critical areas and required buffers ...". With a net acreage of 33 acres at Point Wells (per the 2009 SEIS), to satisfy the Comprehensive Plan's density requirement, a development at Point Wells must have just 396 residential units (= 33 net acres X 12 units per acre).

V.

On the last day of the hearing, May 24, 2018, Examiner Peter Camp stated (at transcript page 142) that the hearing is "recessed [and] any further quasi-judicial hearings will be a continuation of this open record hearing."

Please ask the Hearing Examiner to re-open the hearing, and deny BSRE's applications with prejudice due to an ongoing substantial conflict with SCC 30.34A.040(1).

Thank you.

Tom McCormick

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with a second public access road,
or no development at all."*



BLUE SQUARE REAL ESTATE

VIA Hand Delivery

The Honorable Dave Somers
Snohomish County Executive
3000 Rockefeller Avenue
Everett, WA 98201

August 7, 2019

Dear Executive Somers:

We appreciate the time that your colleagues, Mr. Parks and Mr. Klein, are taking today to meet with our consultant Steve Ohlenkamp and with Lou Frillman, as owner's representative. We would like to use the opportunity of the meeting between your colleagues and our local team to introduce ourselves and, we hope, to begin a productive dialogue. We have asked Steve and Lou to deliver this letter since we cannot attend the meeting in person.

We are happy to be making a fresh start. In the past month the management of BSRE has been changed, and I am now acting as its chief executive. I have been on the job for just a few weeks. This change in management follows the change in the ownership of BSRE in 2016, when Mr. Moti Ben Moshe purchased the entity that controls BSRE, Alon Blue Square Israel. At this time, no one from the ownership group or management team that controlled BSRE at the time of the inception of the Project or during the several years that followed has any continuing involvement with, ownership of or authority over BSRE or the Project.

While the Project is new to us, we know that it most certainly is not new to you. We appreciate that after so many years, there must be fatigue and likely some frustration surrounding the Project. We are here to restart, and we bring a fresh spirit of cooperation, openness and sincerity: we wish to develop a win-win project in Point Wells.

We are keenly aware that a project of this nature cannot proceed without candid dialogue. We are committed to communicating openly and to listening to your perspectives and concerns with an open mind. To that end, we look forward to meeting you in person at the earliest possible date.

In the meantime, as an indication of our desire to communicate openly with you, we would like to explain two procedural actions that we have taken or will be taken. You may be aware already that we have filed a notice of appeal to the Court of Appeals. We shortly will be making a companion filing requesting declaratory judgment. We are making both of those filings simply to preserve procedural rights – actions that if we do not take now we will practically or technically be foreclosed from taking. That is the reason we are making these filings before we have the opportunity to meet in person.

Arranging a meeting and beginning a meaningful dialogue with you is our top priority, and we will get you some dates for possible meetings shortly.

Sincerely,

Miky Zisman
CEO, BSRE

cc: Eric Parks, Deputy County Executive
Ken Klein, Executive Director